

Kluwer Copyright Blog

Towards the Italian implementation of the CDSM Directive

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Despite the turbulent times Italian politics have experienced in the past year – which led to a change of government in the midst of the pandemic emergency – the ball of the transposition of the **CDSM Directive (CDSMD)** into Italian law is still rolling. As of today, it is difficult to predict whether the deadline of June 7 will be met. There are legitimate expectations on the Government’s ability to deliver the official implementation decree by June; however, much will depend on the Parliament’s agenda and reactions to it.



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Showcasing the current lively phase of this process are two recent developments. To start with, on April 20, 2021, the Italian Parliament approved the European Delegation Law (**Act Nr.53 of 22 April 2021**), officially enabling the Government to transpose several EU Directives into national law. Its **Article 9** dictates the guiding principles to be followed in the specific case of the CDSMD. Among them, the Government has committed to embrace a broad definition of “cultural heritage institutions”, ensure adequate levels of security in text and data mining, exclude some uses or works from the scope of the digital teaching exception, set specific requirements for a work to be considered out-of-commerce, indicate which rules apply in the case of an out-of-commerce orphan work, safeguard the rights of press publishers and authors without hindering the free flow of press information, set the rates of payment due to authors ex Art.15(5) CDSMD and publishers ex Art.16 CDSMD as well as the modalities of application of the mechanisms of contractual adjustment and rights revocation, and – last but not least – define the level of diligence required by the obligation to implement “best efforts” to obtain authorization as set in Art.17 CDSMD.

Following these indications, the Italian Government has promptly prepared a first draft of the implementation decree (which the author had the chance to read, yet has not been made available on the Parliament’s website yet). The document reveals itself to be a mature and detailed text, which, to a considerable extent, puts forward a verbatim transposition of the CDSMD. It consists of 12 Articles and purports to reform the 1941 Italian **Act on Copyright and Related Right** (Italian Copyright Act) as follows.

- *Article 1* implements Art.14 CDSMD, adding a new provision on works of visual art in the public domain (a particularly debated point across the Italian artistic and academic communities, see e.g. [here](#) and [here](#)).
- *Article 2* implements Art.15 CDSMD, introducing a new press publisher's right. While it is loyal to the Directive's wording excluding from the scope of the right "individual words or very short extracts", it also clarifies that those extracts should neither replace the original press content, nor exempt the reader from referring to it. It also provides that the revenue shares due to the individual authors are to be determined by way of collective agreements.
- *Article 3* transposes Art.6 CDSMD, adding a paragraph on the preservation of cultural heritage to the existing provision on private copy and reprography exceptions.
- *Article 4* updates the current exceptions for quotation, teaching, and scientific research by re-systematizing them and introducing the new digital teaching exception ex Art.5 CDSMD. Worth noting is that the draft decree leaves intact the existing provision on online use of low-quality images and music works for educational purposes (Art.70(1bis) Italian Copyright Act). Sheet music and all works and uses for which an appropriate and reasonable license is easily available on the market are excluded from the scope of the digital teaching exception (but not from Art.70(1bis) Italian Copyright Act).
- *Article 5* transposes Arts. 3, 4, 7, and 16 CDSMD adding two new provisions on the text and data mining exceptions, one provision on the publisher's claim to fair compensation (capping it at a maximum of 50%), and one final article on the prohibition of contractual arrangements contrary to the new exceptions for cultural heritage preservation, digital teaching, and text and data mining. The draft decree also provides a definition of "cultural heritage institution", which, compared to the Directive's wording, additionally includes public radiobroadcasting organizations.
- *Article 6* adds a new Title to the Italian Copyright Act, dedicated to the uses of out-of-commerce works, thus implementing Arts. 8 to 11 CDSMD. It sets a national requirement for works to be considered out-of-commerce, that is their unavailability via customary channels of commerce for at least 10 years. The provision also establishes a 30-day-long publicity mechanism and the application of rules on out-of-commerce works to orphan works as well.
- *Article 7* adds one further new Title to the Italian Copyright Act, entirely dedicated to the transposition of Art.17 CDSMD. No specific criteria have been added to the definition of "best efforts", whose translation unveils a quantitative nuance (for a glimpse at the Italian debate on this specific point see [here](#)). The new Title foresees a crucial role played by the [Italian National Authority for Communications Guarantees \(AGCOM\)](#) to ensure the proper functioning of the redress mechanisms implemented by platforms, and a stay-down obligation for content subjected to redress complaints. It also includes an explicit reference to the protection of the exception for parody, caricature, and pastiche, which however finds no corresponding provision in the Italian copyright system.
- *Article 8* implements Art.18 CDSMD adding the principle of appropriate and proportionate remuneration to the current provision on the transferability of economic rights.
- *Article 9* implements Art.13 CDSMD introducing a new negotiation mechanism for the licensing of audiovisual works to on-demand online services. It suggests two viable ways (only one of which can be included in the final implementation decree): either electing the Permanent Advisory Committee on Copyright as facilitator by way of a settlement procedure that is already regulated by the Italian Copyright Act, or allowing the parties to jointly appoint an arbiter who, in case of disagreement, will be chosen by the local Court. Article 9 of the draft decree also transposes Arts.19, 20, and 22 CDSMD with specific provisions on the licensees' transparency obligations towards authors and performers, the new contract adjustment mechanism, and the

revocation of rights. Interestingly, the latter faces a broad implementation, which restricts its application only in the case of co-authorship (requiring the consent of all coauthors of main parts of the work), and binds licensees to exploit the work within a maximum of 2 years.

- *Article 10* implements Art.23 CDSMD providing that no contractual agreement can override transparency obligations, contract adjustment mechanism, and rights revocation.
- *Article 11* implements Art.21 CDSMD adding specific reference to the mediation procedure, and enabling right holders' representative bodies to initiate alternative dispute resolution mechanisms.
- *Article 12* intervenes on the consistency of the national copyright system by repealing the provision currently in force according to which works available on the market cannot be considered orphan works.

The draft decree has revived the debate and led to several opinions. First among them, the [Italian Permanent Advisory Committee on Copyright](#) rapidly reacted by way of a comprehensive and thorough position paper, which looks favorably at this draft implementation. The Committee has felt the need to emphasize key aspects of it, such as the broad definition of cultural heritage institution, the strict interpretation of text and data mining practices as addressing only parts of protected works, the expansion of the scope of the quotation and teaching exceptions to “other subject matter” and, at the same time, the application of the carve-out option excluding sheet music and works and uses for which appropriate licenses are easily available from the scope of the new digital teaching exception. The Committee has endorsed the 10-year limitation suggested in the definition of out-of-commerce works, as well as the stay-down obligation for online content during the processing of redress complaints by the platforms. It has also highlighted the validity of the reasons behind the decision to discard a national transposition of Art.12 CDSMD. Lastly, the Committee has advised the Government to seek an additional opinion from AGCOM on the implementation of Art.17 CDSMD, noting that guidelines are expected in this specific regard from the EU Commission.

These recent developments showcase how the Italian CDSMD implementation ‘match’ is now into the final stages – with a possibility of overtime being ‘played’ in the Parliamentary Chambers, most likely in terms of scheduling rather than substantially amending the text of the decree. Whilst awaiting official votes and upcoming legislation, one should not forget that the Italian copyright debate is facing a particularly lively season on many fronts. From pending draft laws on the promotion of scientific open access (see [here](#) and [here](#)) to the thorny issue of overcoming the SIAE monopoly and completing the process of liberalization of the collective rights management market (see [here](#) and [here](#)), the Italian season of copyright reforms may still lead to surprising results.

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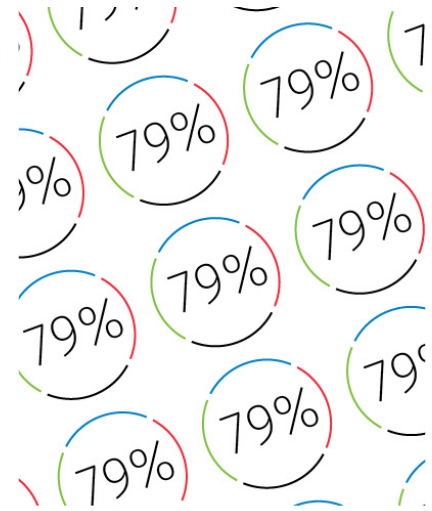
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